

The Administrative Law Judge entered a running award for temporary total disability. Respondent requests the Appeals Board review and decide the following issues:

- (1) The amount of claimant's average weekly wage.
- (2) The nature and extent of claimant's disability.

Claimant requests the Appeals Board to rule on the admissibility of a recorded statement attached to respondent's submission letter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

- (1) The Appeals Board finds that claimant's average weekly wage is \$225. The determination of the average weekly wage in this case is made difficult by the fact there are no written records of what claimant was paid. Claimant testified that he sometimes made as much as \$300 per week, but the general average was between \$200 and \$250 per week.

By attaching a copy to its submission letter, respondent offered into evidence the recorded statement of Mr. Bryan J. Wilkinson. The statement provides additional information about claimant's pay. The Appeals Board finds, however, that recorded statement should not be considered as part of the record in this case. Mr. Wilkinson did not testify and was not available for cross-examination by claimant's counsel. The statement of Mr. Wilkinson was attached to the submission letter after the close of the time allowed for offering evidence. Under these circumstances, the Appeals Board finds the statement should not be considered. The Appeals Board, therefore, relies on the only testimony in the record, that of the claimant that he earned an average of \$200 to \$250 per week, and finds that claimant's average weekly wage was \$225 per week.

The Appeals Board notes claimant has testified he received room and board benefits as a part of his pay. Claimant offered no evidence, however, of the value of those benefits and they are not, therefore, included in the average weekly wage.

- (2) The Appeals Board finds that claimant should receive benefits for a 76 percent disability, based upon a functional impairment which was higher, in this case, than the established work disability.

The Special Administrative Law Judge, as indicated, found that claimant remained temporary totally disabled. Philip R. Mills, M.D. testified claimant had a 76 percent functional impairment. The injury in question was a fracture of T7 from a fall off a roof. The injury left claimant as a paraplegic and also with a neurogenic bowel and bladder. He has problems with spasticity. Dr. Mills also testified that he believed claimant was capable

of substantial and meaningful employment. While claimant is restricted to a wheelchair, the evidence indicates he has normal use of his upper extremities.

James T. Molski testified regarding claimant's ability to earn wages and obtain employment. Mr. Molski stated claimant's ability to perform work in the open labor market has been reduced by 90 to 95 percent. Claimant was limited to sedentary work which could be performed in a wheelchair. He also testified that claimant could probably earn minimum wage. He also testified that claimant sustained a 7 to 22 percent loss of ability to earn wages compared to a \$225 per week average weekly wage. The Appeals Board finds, from review of the entire record, claimant has not established total disability. Neither the medical expert, Dr. Mills, nor the vocational expert, Mr. Molski, testified claimant is totally disabled.

From our own review of the record, the Appeals Board concludes that the work disability claimant suffered would be less than the 76 percent functional impairment. Claimant is, therefore, entitled to benefits based upon the functional impairment for a 76 percent disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris, dated June 10, 1996, should be, and the same is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, William Waterhouse, and against the respondent, Pechin Construction, Inc., and its insurance carrier, American Family Insurance Company, for an accidental injury which occurred September 19, 1992, and based upon an average weekly wage of \$225 for 177.29 weeks of temporary total disability compensation at the rate of \$150 per week or \$26,593.50, followed by 237.71 weeks at the rate of \$114.01 per week or \$27,101.32, for a 76% permanent partial general disability, making a total award of \$53,694.82.

As of November 28, 1997, there is due and owing claimant 177.29 weeks of temporary total disability compensation at the rate of \$150 per week or \$26,593.50, followed by 93.57 weeks of permanent partial compensation at the rate of \$114.01 per week in the sum of \$10,667.92 for a total of \$37,261.42, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$16,433.40 is to be paid for 144.14 weeks at the rate of \$114.01 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Hogan, Wichita, KS
Lyndon W. Vix, Wichita, KS
Jon L. Frobish, Wichita, KS
Philip S. Harness, Director